No. 08-481

Supreme Court, U.S.
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In The

Supreme Court of the United States

SWAMI INC.

Petitioner,

v.

ROBERT LEE in his capacity as Allen County Treasurer, THERESE BROWN in her capacity as Allen County Auditor, and THELMA RETZ,

Respondents.

On Petition For Writ Of Certiorari To The Indiana Court Of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether certiorari should be granted where the Indiana courts decided this case on the basis of Indiana law, specifically, that the Petitioner was barred by res judicata from raising a due process claim because it raised and then abandoned the very same claim in an earlier proceeding?

Whether certiorari should be granted where Petitioner has admitted that actual notice of the tax sale would not have changed the outcome?

Whether certiorari should be granted where, regardless of whether Petitioner's claim is barred by res judicata, the notice provided by the Auditor's office satisfied due process in any event?

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INTRODUCTION

Although Petitioner has done its best to focus the Court's attention on its due process claim, the simple fact is that this case was decided on the basis of res judicata, an issue of state law. Approximately five years ago, Petitioner first challenged the tax sale at issue here by claiming that the notices provided by the Auditor's Office violated its due process rights. During the course of that litigation, Petitioner abandoned the due process claim in favor of other constitutional and state law arguments. After losing at every level of the Indiana court system, Petitioner chose not to appeal to this Court. Instead, it relaunched its due process claim in the trial court. On appeal, the Indiana Court of Appeals twice concluded that Petitioner's attempt to resuscitate the due process claim was barred by res judicata. The Indiana Supreme Court declined to review this decision, presumably because it involved a routine application of the res judicata doctrine. Because no federal issues are implicated in the Indiana courts' decisions, there is no reason for this Court to grant certiorari.

Even if the Court ignores the res judicata issue, however, granting certiorari would not be appropriate. During the first appeal, Swami represented to the Indiana Supreme Court that actual notice of the tax sale would not have changed the outcome. That representation is a binding judicial admission under Indiana law. Based on that admission, there is no reason to grant certiorari, because even if there were a due process violation, the Petitioner suffered no

harm. Finally, a review of the relevant facts reveals that the tax sale notices provided by the Auditor's Office satisfied due process in any event. For all these reasons, certiorari should be denied.

COUNTERSTATEMENT OF THE FACTS

A. Factual Background.

Thelma Retz ("Retz") agrees with the stipulated facts outlined by Petitioner in its petition for writ of certiorari.

B. Procedural Background.

Although Retz largely agrees with the procedural posture of this case as outlined by the Petitioner, two additional points are worth noting. First, Petitioner's motion for remand during the first appeal to the Indiana Supreme Court raised the very same arguments raised during the second round of litigation launched in the trial court. Although the Indiana Supreme Court did not expressly rule on the motion for remand, the denial of Petitioner's petition to transfer had the same effect. Second, after the Indiana Supreme Court denied transfer in 2006, Swami chose not to appeal to this Court under *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708 (2006) or any other basis, thereby ending the first appeal.

REASONS FOR DENYING THE PETITION

A. Res judicata bars Petitioner from re-asserting the due process claim that it raised and then abandoned during the first litigation.

Petitioner argues that this case is about whether its procedural due process rights were violated. However, it is really about whether res judicata bars Petitioner from re-litigating its due process claim.

Tellingly, Petitioner does not even mention the term "res judicata" in the body of its petition. Rather, it attempts to cast the issue as one of waiver. The problem with this tactic is that the decision of the Indiana Court of Appeals was not based on waiver grounds; it was based on res judicata. Waiver is simply not at issue on this appeal.

Even if waiver were at issue, the result would be no different. First, it is worth noting that waiver is a question of state law and therefore not amenable to review in this Court. Second, and as Petitioner acknowledges, under Indiana law, waiver is appropriate where there has been an "intentional relinquishment or abandonment of a known right." *See, e.g., Martin v. Amoco Oil Co.*, 679 N.E.2d 139, 144-45 (Ind. Ct. App. 1997). Petitioner intentionally relinquished a known right here. Indeed, on April 6, 2004, at the very outset of the underlying litigation, Petitioner asserted as the basis for its challenge to the issuance of the tax deed that

> [p]ursuant to the 14th Amendment to the United States Constitution (due process clause), a state, or in this case a county must provide notice reasonable [sic] calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

In that same pleading, Petitioner sought a declaration that the tax deed was "null and void." During the initial round of litigation, Petitioner intentionally abandoned the procedural due process argument in favor of other ones that it apparently believed had a better chance of success. As a result, this argument was waived.

In an implicit nod to the res judicata problem it faces, Swami also argues that before *Jones v. Flowers* was decided, it could not have raised the due process claim in the underlying litigation, because Indiana law was unfavorable at that time. This argument is disingenuous, because it ignores the fact that the due process claim was the basis for launching the underlying litigation, as noted above. Swami cannot now argue that the due process claim was unavailable simply because it made the tactical decision to abandon it. This is precisely what the doctrine of res judicata is designed to prevent. *See Perry v. Gulf Stream Coach, Inc.*, 871 N.E.2d 1038, 1048 (Ind. Ct. App. 2007) ("Res judicata serves to prevent repetitious litigation of disputes that are essentially the same.").

Under res judicata, "all matters that were *or might have been* litigated are deemed conclusively decided by the judgment in the prior action." *Id.* (emphasis in original). As noted by the Indiana Court of Appeals, "Swami had an opportunity to present a claim that the auditor's notice failed to comply with constitutional due process in the underlying litigation and chose not to pursue that line of argument; Swami may not take a second bite at the apple." (Petitioner App. at 34-35).

Even if some Indiana cases had generally held that substantial compliance with Indiana's tax sale statute satisfied due process, that did not prevent Swami from raising a good faith argument to the contrary based on its particular circumstances. This is all the more true since the due process claim arose under federal constitutional law, which the courts nationwide had interpreted differently,[1] and which was constantly evolving. The bottom line is that if Swami, like the plaintiff in *Jones v. Flowers*, had pursued the due process claim in the underlying litigation, it would have had a chance to present the very arguments it is making now. Because Swami chose not to do so, the resulting judgment is binding as to all matters that were or could have been litigated therein. *See Perry*, 871 N.E.2d 1407-48.

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[1] As noted in *Jones v. Flowers*, 126 S.Ct. 1708, 1714-1715 (2006), the courts nationwide were split on whether the government had any additional obligation upon learning that certified notice of a tax sale was returned unclaimed.

Finally, although the decision of the Indiana Court of Appeals was consistent with decades of precedent and is a straightforward application of the doctrine of res judicata, there would be no basis for granting certiorari if it were not. This is so because res judicata rules are a matter of state law, not federal law. *See Jarrard v. CDI Telecommunications, Inc.*, 408 F.3d 905, 916 (7th Cir. 2005). Whether or not the Indiana courts properly interpreted their precedents on res judicata is not a matter appropriate for this Court's review.

In conclusion, the Petition does not support the exercise of this Court's jurisdiction. The Indiana Court of Appeals correctly decided this case on basic principles of res judicata in a manner consistent with longstanding state law. Petitioner could have, and actually did, raise the due process claim before abandoning it in the underlying litigation. As a result, Petitioner was properly barred from re-litigating this issue during the subsequent proceedings.

B. Granting certiorari would be inappropriate because the Petitioner represented to the Indiana Supreme Court that actual notice of the tax sale would have made no difference in the outcome.

Leaving aside the res judicata issue, granting certiorari would also be inappropriate because the Petitioner has admitted that even if it had had actual notice of the tax sale, the result would have been no different. Specifically, during the briefing of the first

appeal to the Indiana Supreme Court, Swami stated to that court as follows:

> *Notice is not relevant under these circumstances. . . . If Swami had received actual notice of the pending tax sale, nothing would have changed.* A representative of Swami . . . would have gone to the county offices and inquired as to the amount owed on the Property. This is exactly what Jyothirmai did, without the notice. The problem is that she was misinformed by the official. Receipt of notice would not have prevented the official from providing Jyothirmai with inaccurate information. . . . *[A]ctual notice was immaterial. It would not have changed the ultimate outcome.* (emphasis added).

Swami's statements are binding judicial admissions under Indiana law. *See In Re K.H.*, 838 N.E.2d 477, 480 (Ind. Ct. App. 2005) ("[A] clear and unequivocal admission of fact by an attorney is a judicial admission which is binding on the client."). As a result, Swami is estopped from now arguing that some form of additional notice issued by the county would have prevented the tax sale. *See, e.g., Dell v. City of Tipton*, 618 N.E.2d 1338, 1342 (Ind. Ct. App. 1993) ("[A] party should be estopped from assuming successive positions in the same litigation with respect to the same fact or set of facts which are inconsistent and mutually contradictory.").

In prior briefing, Swami has tried to get around this conclusion by arguing that even though actual notice was immaterial, the Auditor's Office was still

obliged to afford Swami due process. This argument misses the point. The issue is not whether Swami's judicial admissions excuse the Auditor's Office from providing due process. Rather, it is whether Swami can succeed on a notice-based due process claim when it has admitted that actual notice would not have affected the outcome of that claim.

A fundamental element of any claim, including due process claims, is some form of damage or harm. Indeed, "[t]he due process clause does not mandate procedure for its own sake." *Woods v. City of Michigan City, Indiana*, 940 F.2d 275, 284 (7th Cir. 1991); *Gometz v. Henman*, 807 F.2d 113, 115 (7th Cir. 1986) ("The right of access to the courts, like all procedural rights under the due process clause of the fifth amendment, is an entitlement to enough process to ensure a reasonable likelihood of an accurate result, not to process for its own sake."). By admitting that actual notice would not have changed the outcome of the case, Swami has essentially admitted that any due process violation did not cause any harm. It is hard to imagine how granting certiorari could be appropriate where the issue to be appealed is of no consequence to the outcome to the case.

C. The notice provided by the Auditor's Office in this matter satisfied due process in any event.

Although the Court of Appeals did not reach the merits of Swami's due process argument, the result would have been the same if it had. Basically, the

trial court concluded that under *Jones v. Flowers*, the Auditor's Office should have done more to notify Swami of the impending tax sale. The problem with this conclusion is that the Auditor's office *did* take additional reasonable steps to do so. The steps Swami argues were necessary either would have made no difference (especially since Swami has admitted that actual notice would have made no difference in the outcome of this case), or are not required under *Jones v. Flowers*.

In *Jones v. Flowers*, the Court held that if the government learns that its certified mail notices were unclaimed, it must take "additional reasonable steps to notify [the tax delinquent], if practicable to do so." *Jones v. Flowers*, 126 S.Ct. at 1718. At the same time, the Court took pains not to "prescribe the form of service that the [government] should adopt." *Id.* It did note, however, that potential reasonable forms of notice might include sending the tax sale notices by first class mail or to "occupant," or posting the notices on the property. *See id.* at 1718-1719.

In *Jones v. Flowers*, the certified mail notices were returned "unclaimed." Here, they were returned "Returned to Sender – Undeliverable as Addressed – Unable to Forward." The distinction is important, because "unclaimed" suggests that the addressee may still live at the property, while "Undeliverable as Addressed – Unable to Forward" suggests that the addressee has moved. If the addressee has moved, of course, first class mail notice and/or posting are unlikely to provide actual notice.

In any event, unlike in *Jones v. Flowers*, the Auditor's Office did not do nothing after learning that the certified mail notices sent to Swami's address of record were "undeliverable as addressed." The Auditor's Office searched its own records, as well as the local phonebook, in an attempt to track down an address for Swami. As noted above, under *Jones*, this was above and beyond what was required. *See Jones v. Flowers*, 126 S.Ct. at 1719 ("We do not believe the government was required to go [as] far [as] search[ing] for [the taxpayer's] new address in the . . . phone book and other government records.").

The phone book was a dead-end, since Swami's number was not listed. However, after learning from its own records that Swami owned an adjacent parcel of property, the Auditor's Office sent notice via certified mail to that property as well.[2]

The Auditor's Office also posted notice of the tax sale at a public place of posting, and it published notice of the tax sale once each week for three (3) consecutive weeks in the local newspapers. These notices were far more extensive than the single published notice found insufficient in *Jones*.

In addition, after the tax sale, but well before the expiration of the redemption period, the Auditor's

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[2] Presumably because there was no residence on the adjacent property, this notice was sent back with the notation: "Returned to Sender – No Such Number." (Affidavit of Scot Harber at ¶ 21).

Office conducted a title search on the property and, after learning of a mortgage on the property, sent notices to the mortgagee. The mortgagee received actual notice of the tax sale and, as a consequence, the period of redemption. The Auditor's Office could have reasonably believed that actual notice to the mortgagee would substantially increase the likelihood of actual notice to Swami. *Cf. Jones*, 126 S.Ct. at 1719 (recognizing that notice to persons with even a tenuous relationship to the tax delinquent is likely to increase the chance of actual notice).

In the trial court, Swami argued that the Auditor's Office should have (1) sent the notice by regular mail, (2) posted the notice on the tax sale property, or (3) checked with the Secretary of State to determine Swami's registered agent. In light of the other reasonable steps taken by the Auditor's Office, these options were not required. *Cf. Jones*, 126 S.Ct. at 1718 (*Jones* does not "prescribe the form of service that the [government] should adopt.").

Moreover, sending the notice by regular mail would have made no difference in this case. Swami moved out of the Dell Cove address in July of 1999. The county did not send the first notice of tax sale until July 23, 2002 – some three years after Swami moved. Since the USPS forwards mail for only one year after a change of address form is filed, the regular mail notice would have been returned "Unable to Forward," just like the certified mail notice was. Likewise, there was no front door available on

the Real Estate to post notice of the tax sale, because the land was undeveloped. *Jones* is distinguishable in this regard.

Similarly, the Auditor's Office had no obligation to contact the Secretary of State to determine Swami's agent. As *Jones* acknowledged, the Auditor's Office is not required to search other government records, or even the phonebook, to determine where to send notice. Contacting the Secretary of State is no different.

For all these reasons, the notice provided by the Auditor's Office satisfied due process, and therefore there is no reason for this Court to grant certiorari.

CONCLUSION

This matter was decided on the basis of res judicata, an issue of Indiana law, and therefore there is no basis for granting certiorari. Because the Petitioner raised and then abandoned its due process claim in the underlying litigation, the Indiana Court of Appeals properly held that this claim was barred by res judicata. Even if the Court ignores the res judicata issue, there is no reason to grant certiorari. The notice provided by the Auditor's Office satisfied due process, and Swami has admitted that actual notice would have made no difference in the outcome of the case. For the foregoing reasons, Thelma Retz respectfully requests that this Court deny the

petition for writ of certiorari and order all other just and proper relief.

Respectfully submitted,

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